

Resolution No.: 17-314
Introduced: November 29, 2011
Adopted: November 29, 2011

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: District Council

SUBJECT: APPLICATION DPA 11-1, ON REMAND, FOR DEVELOPMENT PLAN AMENDMENT of the development plans approved by the Council in LMAs G-735 and G-784 on April 10, 2001, and previously modified in DPA 04-3 (approved by the Council on December 14, 2004) and DPA 05-1 (approved by the Council on June 24, 2008); Robert R. Harris, Esquire, Attorney for the Applicant, Clarksburg Village Center, LLC; OPINION AND RESOLUTION ON APPLICATION; Tax Account No. 02-03588946.

OPINION

Applicant, Clarksburg Village Center LLC, filed Development Plan Amendment 11-1, on July 19, 2010, seeking to amend the development plans approved by the Council on April 10, 2001, as part of LMAs G-735 and G-784, and previously modified in DPA 04-3 (approved by the Council on December 14, 2004) and DPA 05-1 (approved by the Council on June 24, 2008).

The subject property consists of 17.4 acres located in Clarksburg, on a block defined by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west. It is in the PD-4 Zone, and is listed as Parcel P047 under Tax Account Number 02-03588946.

This case revolves around the following binding element in the Development Plan approved ten years ago in LMA G-784, which currently governs the timing (also referred to as “the staging”) of retail/commercial development in the subject site, Clarksburg Village Center:

No building permits shall be issued for retail/commercial uses until 90,000 square feet of retail uses within the Clarksburg Town Center have been established.¹
[Emphasis added.]

¹ A similar, but not identical, “general note” is contained in the Development Plan approved concurrently in LMA G-735:

Development of the commercial space will follow the development of approximately 90,000 sf of retail uses in Clarksburg Town Center, in conformance with the 1994 Master Plan.

Thus, the existing binding element delays the development of retail/commercial uses in the subject site, Clarksburg Village Center, until there is a specified amount of retail/commercial development in the nearby Clarksburg Town Center.

Though the history is a bit complex, the relief requested in this DPA application is quite simple – a limited release from the staging restrictions placed on its commercial/retail development to better serve the residents of Clarksburg Village, and some language to indicate that development on this site is unified under one owner, the Applicant (a fact already recognized by the Council in DPA 05-1). DPA 11-1 seeks to accomplish this end by proposing one new binding element for the clarification and a modification of an existing binding element to partially lift the staging restriction. No change in the use, density or design is proposed. 11/29/10 Tr. 9.

The two proposed binding elements are:

- This property will be developed with 109,000 square feet maximum of commercial/retail use and 100 age-restricted residential units.
- Building permits for the commercial/retail buildings will not proceed until the earlier of either the issuance of building permits for 90,000 square feet of retail within the Clarksburg Town Center, or May 1, 2012.

The proposed DPA is supported strongly by the Clarksburg Civic Association, the Gateway Commons Homeowners Association and by the residents of Arora Hills and Clarksburg Village, who currently have no convenient retail nearby. 11/29/10 Tr. 42-69. It is opposed by NNP II-Clarksburg LLC (also known as “Newland”), the developer of the nearby Clarksburg Town Center. Newland opposes because it believes that preventing competing retail from Clarksburg Village Center will help ensure successful establishment of Newland’s own retail in the Clarksburg Town Center. Newland bases its argument primarily on the language in the 1994 Clarksburg Master Plan & Hyattstown Special Study Area.

Based on Master Plan language which existed prior to its amendment, both Technical Staff and the Planning Board initially recommended against approval of DPA 11-1, until the Master Plan could be amended. Exhibits 19 and 21. As is evident from their pre-hearing memoranda (Technical Staff memo of November 8, 2010, and Planning Board memo of November 24, 2010), both Staff and the Planning Board favor the relief requested by the Applicant, but they felt constrained by the pre-existing Master Plan language. The Planning Board’s initial vote to recommend denial of the DPA application prior to amendment of the Master Plan was two to one. The Planning Board majority suggested, as an alternative, a limited amendment to the Master Plan, followed by consideration of the DPA.

The initial hearing in this case was duly noticed for November 29, 2010, and the hearing proceeded as scheduled. Applicant called two witnesses at the hearing, David Flanagan, President of Elm Street Development, developer of Clarksburg Village, and Kate Kubit, a vice president of Elm Street. Four area residents testified in support of the DPA. There were no opposition witnesses; however, during the hearing, a letter of opposition (with attachments) was filed by attorneys for NNP II-Clarksburg LLC, the developer of Clarksburg Town Center. Exhibit 27. At the beginning of the hearing, the Hearing Examiner announced that he would take official notice of the record in LMA G-735, LMA G-784, and DPAs 04-3 and 05-1, to the extent necessary for his report. 11/29/10 Tr. 5-6. No objections were raised.

The record closed, prior to the first Council review, on January 21, 2011. On January 31, 2011, the Hearing Examiner filed his first Report and Recommendation to the Council, recommending approval of the development plan amendment and that the Council direct the Planning Board to prepare a limited Master Plan amendment of the 1994 Clarksburg Master Plan & Hyattstown Special Study Area for the sole purpose of modifying the commercial/retail staging plan, to remove the restriction on the timing of commercial/retail development in the Clarksburg Village Center (referred to in the Master Plan as the Newcut Road Neighborhood Center).

On February 15, 2011, the Council amended the Planning Department's work program to include an amendment to the Clarksburg Master Plan's staging provisions. The intent of this direction to the Planning Department was to correct the Master Plan's staging language which was delaying retail development in Clarksburg Village, as indicated by its legislative staff. Exhibit 69. By Resolution 17-69 of March 1, 2011 (Exhibit 57), the District Council took official notice of its instructions to the Planning Department, and therefore remanded DPA 11-1 to the Hearing Examiner with explicit directions to:

- a) open the record for new testimony on any Clarksburg Master Plan Amendment that may be approved; and
- b) amend his report and recommendation in a manner that considers the new record.

The Planning Department subsequently recommended a modification of the Master Plan's staging provisions, and the Planning Board endorsed that recommendation to the Council. Exhibit 71. By Resolution 17-188, adopted June 28, 2011 (Exhibit 59), the District Council approved the Planning Board's Draft Limited Amendment to the Clarksburg Master Plan & Hyattstown Special Study Area, dated May 2011. The revisions to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area changed the staging requirements of the Master Plan to allow retail development in the Newcut Road and Cabin Branch neighborhoods on approval of a Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, rather than requiring retail development in the Newcut Road and Cabin Branch neighborhoods to await the actual development of retail use in the Town Center. Since that Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center had already been approved (Exhibit 73), the effect of the Master Plan Amendment was to remove the staging impediment to allowing retail development in Clarksburg Village Center, as requested in the subject DPA 11-1.

Based on that amendment to the Clarksburg Master Plan, Françoise Carrier, the Chair of the Planning Board, by letter dated August 18, 2011 (Exhibit 62), advised the Hearing Examiner that further review by the Planning Board was unnecessary because adoption of the Master Plan Amendment resolved the only objection that the Planning Board had to DPA 11-1 in its November 18, 2010 review. She noted that the Board has already stated "it would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center Development to which the Master Plan gave top priority," subject only to master plan staging issues.

On September 6, 2011, the Hearing Examiner issued an Order and Notice (Exhibit 64) reopening the record and setting the hearing on remand for October 14, 2011, with instructions that all previous testimony and exhibits will remain in the record. On October 3, 2011, Stephen

Kaufman, Newland's counsel, submitted a letter (Exhibit 65) reasserting Newland's objections to DPA 11-1.

The hearing on remand proceeded on October 14, 2011, as scheduled. Robert Harris, counsel for the Applicant appeared and introduced a number of exhibits. No additional witnesses were called, and no one appeared on behalf of Newland. The record was held open until October 28, 2011, to give Applicant time to file a copy of the approved Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, and to give interested parties ten days to comment. Applicant filed the Preliminary Plan in question on October 18, 2011 (Exhibit 73), and the record closed, as scheduled, on October 28, 2011, with no further comment by any party.

On November 9, 2011, the Hearing Examiner filed his Remand Report and Recommendation, recommending approval of the development plan amendment, based on his conclusion that the proposed DPA would be consistent with the purpose and regulations of the PD-4 Zone, compatible with surrounding development and in the public interest. Based on its review of the entire record, the District Council finds that the application does meet the standards required for approval of the requested development plan amendment, for the reasons set forth by the Hearing Examiner. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Remand Report and Recommendation is incorporated herein by reference and his findings and conclusions are hereby adopted.

Because this application does not request changes in use or density, the previous Council findings on these issues in LMAs G-735 (Resolution No. 14-834) and G-784 (Resolution No. 14-835), and DPAs 04-3 (Resolution No. 15-849) and 05-1 (Resolution No. 16-635), are hereby incorporated by reference. Except with regard to the timing of retail/commercial development issue, these findings establish that:

1. The proposed development satisfies the intent, purpose and standards of the PD-4 Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The proposed development would be compatible with development in the surrounding area; and
3. The zoning use and density, previously approved, is in the public interest.

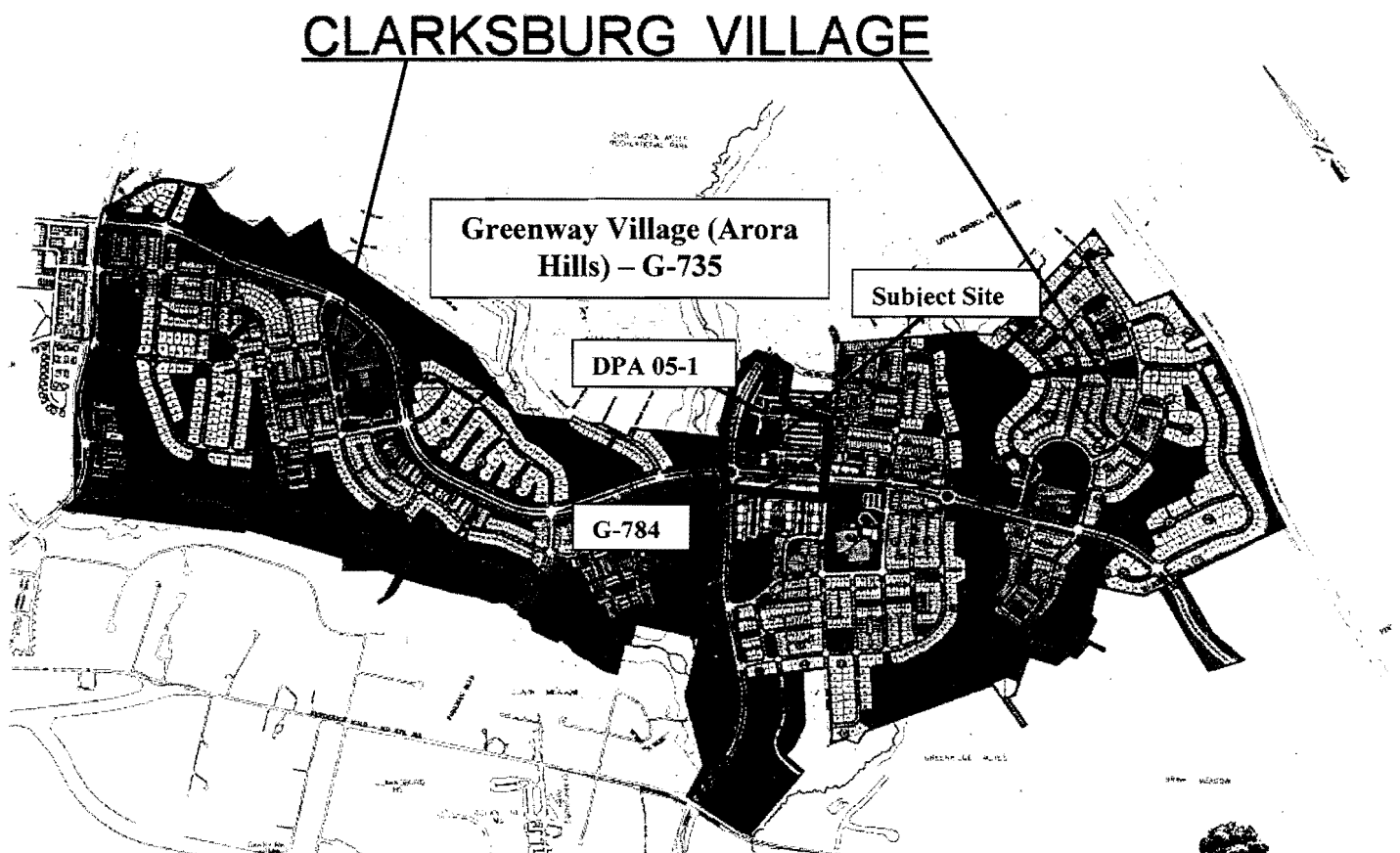
The remaining issue regarding the staging of retail/commercial development will be discussed below. Based on this analysis, the District Council concludes that DPA 11-1 can and should be granted by the Council at this stage. The one issue that legitimately concerned Technical Staff and the Planning Board prior to the remand (*i.e.*, the pre-amendment Master Plan language regarding staging) has now been eliminated by the amendment to the Master Plan.

The subject site is located in the "Newcut Village" area of Clarksburg. Newcut Village is composed of Greenway Village (also known as Arora Hills) and Clarksburg Village. Although the site of DPA 11-1 is only the 17.4 acre area designated as Clarksburg Village Center, portions of that site were subsumed in LMAs G-735 and G-784, and in DPA 05-1. On April 10, 2001, the Council approved LMA G-735 (Greenway Village), which rezoned approximately 374 acres of

land in Clarksburg to the PD-4 Zone.² This large tract is located south of the Ovid Hazen Wells Recreational Park, east of Stringtown Road (which separates it from the Clarksburg Town Center), west of Ridge Road, and due north of Clarksburg Village. LMA G-735 approved the construction of a new development, Greenway Village (also known as Arora Hills), with 1,330 dwelling units and a commercial center containing 89,000 square feet of retail/commercial uses.

At the same time, LMA G-784 approved the rezoning of a 4 acre portion of the Clarksburg Village Center site for development in the PD-4 Zone. The small area that was rezoned in G-784 is located on the southern portion of the 17.4 acre DPA 11-1 subject site, and is designated for 20,000 square feet of commercial/retail development. The subject site is bordered on its north by Greenway Village and on its east, south and west by the new residential development of Clarksburg Village, which consists of about 690 acres, scheduled for 2,653 dwelling units, north and east of MD Rt. 355.

The following map (Exhibit 23) depicts all of Clarksburg Village, with Greenway Village to its north (together, they are Newcut Village). The subject site (Clarksburg Village Center) is bordered in black, with a dashed line setting off the divide between G-784 and DPA 05-1:



² Prior to these rezonings, the overall tract had been classified under the R-200 Zone by the 1958 Countywide comprehensive zoning, and on October 25, 1994, it had been rezoned from the R-200 Zone to the R-200/TDR-3 Zone by Sectional Map Amendment G-710.

The two zoning reclassifications (G-735 and G-784), taken together, approved a total of 109,000 square feet of commercial space within the subject site. LMA G-735 was later modified by two development plan amendments, DPA 04-3 and DPA 05-1.

On December 14, 2004, the Council approved DPA 04-3, which allowed an additional 2,000 square feet of indoor community (*i.e.*, non-commercial) space in Greenway Village, but it contains the following General Note addressing commercial space:

14. Development of the 90,000 s.f. commercial space that was previously approved with this plan is now being developed with the retail uses in Clarksburg Village.

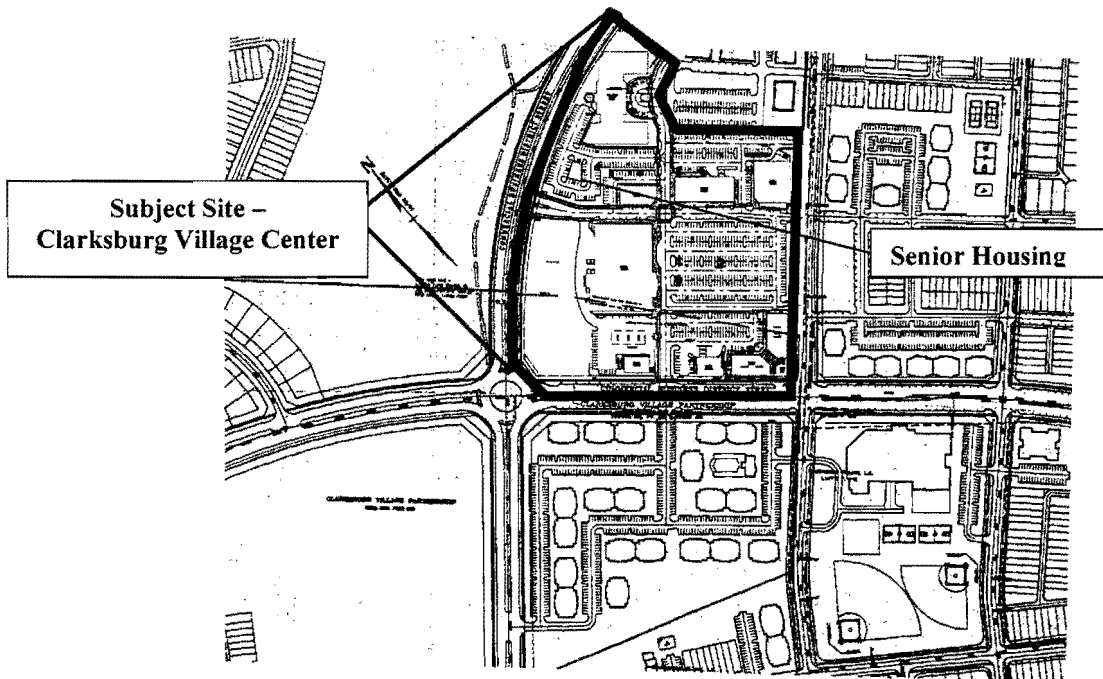
DPA 05-1 also approved a change to the development plan in LMA G-735. That change, approved by the Council on June 24, 2008, in Resolution No. 16-635, permitted the developer to add a 100 unit, age-restricted, multifamily, building on the northwest quadrant of the 17.4 acre subject site. By the time the Council approved DPA 05-1, the developer of Clarksburg Village had purchased Greenway Village's portion of the subject site (*i.e.*, the planned commercial area), so the entire area of Clarksburg Village Center, destined for 109,000 square feet of commercial development (as well as the senior housing approved in DPA 05-1), is under single ownership of the Applicant, Clarksburg Village Center, LLC. DPA 05-1 contains a General Note 14 identical to the one included in DPA 04-3.

Neither the amount nor the location of commercial/retail development in Clarksburg Village Center is disputed by any party. In fact, on April 15, 2010, the Montgomery County Planning Board voted to approve a Preliminary Plan Amendment and a Site Plan for Clarksburg Village that included the subject 109,000 square feet of retail and the 100 multi-family dwelling units. Exhibit 66. It is the timing of the commercial/retail development of Clarksburg Village Center which is at issue in this case.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The "surrounding area" is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Because the proposed commercial/retail development is intended to serve all of Newcut Village (*i.e.*, Arora Hills and Clarksburg Village), it is fair to consider this whole development as the surrounding area. Directly southeast of the site is a proposed elementary school and to the west, across Little Seneca Parkway, is the Greenway Trail. Other than that, the site is surrounded by existing and planned residential development, consisting of single-family detached homes, townhouses, two-over-two units and multi-family buildings.

The 17.4 acre subject site consists of the northwest quadrant of the site layout contained on DPA 11-1. The subject site is depicted in DPA 11-1 (Exhibit 51(a)), which is reproduced on the following page.



Proposed Changes to the Development Plan

DPA 11-1 contains two proposed textual binding elements and four proposed general notes. The previous general notes and binding elements have been crossed out on DPA 11-1 because they have been superseded by site planning and other developments, as detailed in Exhibit 53(a). The proposed textual binding elements and general notes on DPA 11-1 are:

Binding Elements:

- This property will be developed with 109,000 square feet maximum of commercial/retail use and 100 age-restricted residential units.
- Building permits for the commercial/retail buildings will not proceed until the earlier of either the issuance of building permits for 90,000 square feet of retail within the Clarksburg Town Center, or May 1, 2012.

Proposed General Notes:

- This is an amendment to the original Development Plan approved in Local Map Amendment G-784.
- This amendment clarifies that the Village Center, including both the commercial/retail and the age restricted housing is being developed as part of Clarksburg Village.

- Building footprint and design, pedestrian features, open space components and parking area are approximate and reflect approval of Site Plan Application No. 820100040, approved April 15, 2010.
- Site Plan Application No. 820100040 incorporates the binding elements for the age restricted housing component in DPA 05-01.

Pursuant to Code § 59-D-1.11, development in the PD-4 Zone is permitted only in accordance with a development plan that is approved by the District Council, pursuant to Code §-D-1.7. In the present case, we are examining a proposed amendment to the development plan, rather than a rezoning application. The standards for review are similar, where, as here, a public hearing is required, because Zoning Ordinance §59-D-1.7(d)(2) directs OZAH to compile the record “in the same manner as the record is compiled for a local map amendment application.”

However, this is an unusual case because the only requested changes concern restrictions on the timing of commercial/retail development, not its use, density, size or design. The District Council has already approved the zoning, use, density and size, as well as the development plan for the site. Those approvals continue in effect, and findings made by the District Council in LMAs G-735 and G-784, as well as DPAs 04-3 and 05-1, justifying the PD-4 Zone and the proposed density, use, size and design, have been incorporated herein by reference. Therefore, no evidence regarding the use, density, size or design was produced or evaluated in this case. The merit of the proposed DPA 11-1 is evaluated herein based on the issues related to the staging of commercial/ retail development permitted in Clarksburg Village Center.

Given the pre-existing findings regarding density, use, size and design, the District Council need only evaluate the changes to the proposed binding elements and general notes as they affect the permitted timing of commercial/retail development in the context of the applicable Master Plan and the purpose clause of the PD-4 Zone.

The first proposed binding element merely clarifies that which was previously approved in earlier Council resolutions – that the site would be developed with up to 109,000 square feet of commercial/retail use and with 100 age-restricted residential units.

The second proposed binding element provides the operative change to the existing restriction in the timing of commercial/retail development on the site by allowing the Applicant to proceed with commercial/retail buildings after May 1, 2012, or after Clarksburg Town Center gets building permits for 90,000 square feet of retail, which ever occurs first.

The Planning Board reports, in its letter of November 24, 2010 (Exhibit 21), “To date there has been no retail development in the Clarksburg Town Center.” As a result, the language of the existing binding element has prevented any commercial/retail development to serve the residents of Newcut Village (*i.e.*, Arora Hills and Clarksburg Village). The frustration of the area residents with this situation was exemplified by the testimony of Margaret Clinton, who moved to her current house in Clarksburg Village in April of 2008. She stated (11/29/10 Tr. 51-52),

Since then, we've been driving 12 miles round trip to the closest grocery store, which is a very overcrowded Giant. It's the Neelsville one. If we want to do more specialty shopping, we have to drive 22 miles round trip to Whole Foods, or 24 miles round trip to the closest Harris Teeter.”

* * *

Not only is this a burden on our family, but it's also not environmentally friendly and contributes to the traffic problems on 270 and 355, especially after 3:00 p.m., when it can take 30 minutes or more to make it back the six miles to Clarksburg from Milestone.

We cannot wait for Newland to begin work on their retail center. We please ask that you allow Elm Street to continue the excellent work they have done for Clarksburg, and complete our retail center as soon as possible.

Standards for Council Review as Applied to this Limited DPA Application

Sections 59-D-1.61 and 59-D-1.7 of the Zoning Ordinance require the District Council, before it approves any application for re-zoning to a Planned Development (PD) Zone or an amendment to a previously approved development plan in a PD Zone, to consider whether the application, including the development plan, fulfills the "purposes and requirements" set forth in Code Section 59-C for the PD zone. In making this determination, the law expressly requires the District Council to make five specific findings, "in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification." The five specific findings required by §59-D-1.61 the Zoning Code are:

- (a) *T[hat t]he proposed development plan substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. * * * [The remaining language of this provision addresses permitted exceptions to height and density restrictions not at issue in this case; it is therefore not quoted here.]*
- (b) *That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*
- (c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*
- (d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*
- (e) *That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The opposition in this case suggests that Applicant has failed to make a showing sufficient to satisfy the findings required in this case because the evidence does not address the use, density, orientation and design of the project in connection with the purpose clause of the PD-4 Zone and the applicable Master Plan. Exhibit 45, pp. 4-5. Applicant replies that it is not requesting any changes in the use, density, orientation and design of the project, only its timing with regard to retail development, and that the Council has already made the required findings on the non-timing issues. Exhibit 49.

Technical Staff echoed Applicant’s position in the Staff report (Exhibit 19, p. 5):

The present DPA does not propose any change to the use or density already approved. No change is being proposed that would affect any of the standards or regulations of the PD zone. Therefore, staff finds that the proposed amendment that is the subject of the current DPA is consistent with and remains in compliance with the findings required to be made at the time of the original development plan approval **except with respect to timing**.

The District Council agrees with the Applicant and Technical Staff. In this case, the only changes sought relate to the timing of commercial development, as previously discussed, not with the use or density. The Applicant addressed the issue of timing and its connection with the Master Plan on the record at the hearing; the opposition elected not to appear at either hearing. Instead, it sent letters (Exhibits 27, 45 and 65), which were received into the record.

There are no issues in this case regarding density, height, compatibility, safety, internal vehicular and pedestrian circulation, the environment, ownership or the like, for there is no proposal to change the use or density of the site. It is therefore unnecessary to address those issues in this resolution. In fact, to do so, in the absence of any changes in the relevant facts or law, would violate the doctrine of administrative *res judicata*.

The doctrine of administrative *res judicata*³ precludes re-examination in a later

³ Some courts have noted that the term “*res judicata*” technically does not apply to administrative proceedings; rather, an administrative body may not change its position arbitrarily, and in the absence of a showing of fraud, surprise, mistake, inadvertence or a new or different factual situation, a change in a finding of the administrative body

proceeding of issues earlier decided in the same case by an administrative body acting in a quasi-judicial capacity, absent good cause (*e.g.*, fraud, surprise, mistake, inadvertence or a new or different factual situation). *See, Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962) and *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md. 187, 194-197, 216 A.2d 149 (1966). In this case, the only changes requested concern restrictions on the timing of commercial/retail development, not its substance. The District Council has already approved the zoning, use and density, as well as the development plan for the site. Those approvals continue in effect, and findings made by the Council in LMAs G-735 and G-784, as well as DPAs 04-3 and 05-1, justifying the PD-4 Zone and the proposed density and use, are incorporated herein by reference. The remaining issue, whether the proposed change in the timing of commercial/retail development in Clarksburg Village Center satisfies the statutory standards, is discussed below. The only findings which are applicable to this issue, given the incorporated findings regarding use, density and compatibility, relate to Master Plan compliance and the public interest.

The Master Plan

The subject site is within the area covered by the Clarksburg Master Plan & Hyattstown Special Study Area, approved and adopted in June 1994, and amended on June 28, 2011, by Resolution No. 17-188. Exhibit 59.

The Master Plan expressly recommends, at page 62, that there be 109,000 square feet of retail development to serve the Newcut Road Neighborhood, and that it be located in the neighborhood center (*i.e.*, the subject site). As stated by Technical Staff (Exhibit 19. p. 3), “[t]he Clarksburg Master Plan makes clear the importance of a neighborhood retail core to serve the Newcut Community including Clarksburg Village and Arora Hills [*i.e.*, the neighborhood of the subject site]. . . . However, the Clarksburg Master Plan [*prior to its amendment on June 28, 2011, by Resolution No. 17-188*] also clearly prioritizes the Town Center as the first retail center to be established in the planning area, and contains several specific and consistent provisions pertaining to the timing of retail development for the planned implementation of Clarksburg.” It is this language in the pre-amendment Master Plan that accounts for the initially negative recommendations by Technical Staff and the Planning Board regarding this DPA, despite the conclusion by both of those bodies that commercial development on the subject site is needed without delay to serve the community.

By Resolution 17-188, adopted June 28, 2011 (Exhibit 59), the District Council approved the Planning Board’s Draft Limited Amendment to the Clarksburg Master Plan & Hyattstown Special Study Area, dated May 2011. The revisions to the 1994 Clarksburg Master Plan & Hyattstown Special Study Area changed the staging requirements of the Master Plan to allow retail development in the Newcut Road and Cabin Branch neighborhoods on approval of a Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center, rather than requiring retail development in the Newcut Road and Cabin Branch neighborhoods to await the actual development of retail use in the Town Center.

may be arbitrary. As stated in *Gaywood Community Asso. v. Metropolitan Transit Authority*, 246 Md. 93, 100, 227 A.2d 735, 739 (1967), “While the action of an administrative agency reversing itself or a predecessor agency may resemble *res judicata*, it is not, as the cases show, the same as the final decision of a proceeding on its merits by a court of competent jurisdiction.”

Since that Preliminary Plan for 90,000 square feet of retail uses in the Clarksburg Town Center had already been approved (Exhibit 73), the effect of the Master Plan Amendment was to remove the staging impediment to allowing retail development in Clarksburg Village Center, as requested in the subject DPA 11-1.

The first “Plan Objective” listed in the Master Plan under “Land Use Plan Recommendations by Geographic Area” (MP, p. 42.) is to “Create a Town Center which will be a strong central focus for the entire Study Area.” On page 46 of the Master Plan, it states, “This Plan recognizes that retail uses are critical to the validity of the Town Center.”

The Master Plan also contains a section, beginning on page 186, entitled “Staging Recommendations.” There are seven “guiding staging principals, which are integral components of this Master Plan . . .” MP, pp. 187-192. These staging principals “provide a general framework and guidance for the future staging or timing of private development and the provision of public facilities in Clarksburg . . .” MP, p. 187.

Staging “Principle #4: Development of a Strong Community Identity” specifies (MP, pp. 189-190),

- ***The Town Center:*** *Encourage the early development of the Town Center to create a strong sense of community identity and to provide a model for later development in other areas.”*

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- ***Coordinated Residential and Commercial Development:*** *Provide for sufficient residential units to support Town Center retail and commercial activities.*

This Plan recognizes that retail uses are critical to the validity of a community and can play a significant role in reinforcing the Town Center as a central focus for the entire Clarksburg area. Once a sufficient critical mass of housing units are in place to support a retail center (retailers indicate that approximately 3,500 to 4,000 dwelling units are needed to support a retail development that includes a grocery store)⁴, this Plan recommends that early retail development priority be given to the Town Center. Retail development in the Newcut Road and Cabin Branch neighborhoods should follow the development approval with a Preliminary Plan of approximately 90,000 square feet of retail uses in the Town Center. [Emphasis included to indicate words added by the June 28, 2011 amendment.]

Beginning on page 192 of the Master Plan is a section entitled, “*The Staging Sequence for Private Development.*” Stage 3 of the development is discussed on page 196 of the Plan. Prior to the amendment of the Plan, it provided, in relevant part,

⁴ David Flanagan, President of Elm Street Development, testified that, according to Park and Planning’s figures, there are currently 5,000 houses on the ground in Clarksburg. 11/29/10 Tr. 24. It is therefore in the mid-stages of development and still has no retail. 11/29/10 Tr. 30. The Harris Teeter grocery chain has expressed an interest in building a supermarket in the Clarksburg Village Center. Exhibit 30.

... Retail/commercial development in the Newcut Road and Cabin Branch Neighborhoods will be deferred, however, until 90,000 square feet of retail uses have been established in Clarksburg's Town Center.

It now reads:

... Retail/commercial development in the Newcut Road and Cabin Branch Neighborhoods will be deferred, however, until 90,000 square feet of retail uses have been approved with a Preliminary Plan in Clarksburg's Town Center. [Emphasis included to indicate words added by the June 28, 2011 amendment. The word "established" was deleted]

Similarly worded statements were also included under "*Implementing Mechanisms*," on the same page of the Master Plan, and they were similarly amended.

There was evidence introduced at the initial hearing that the staging restriction in question was not a central part of the Master Plan process, but rather was added in at the very end at the urging of counsel for Newland. 11/29/10 Tr. 31-37; 69-73. That point has been mooted by the amendments to the Master Plan.

Newland argues in its letter of October 3, 2011 (Exhibit 65), that DPA 11-1 "conflicts with the Master Plan vision for the Town Center as a central focal point for the area." To the extent that staging had been a focus of the Master Plan as originally adopted, it is clear that the intent of these Master Plan amendments was to remove the staging impediment to allowing retail development to begin now in Clarksburg Village Center. This conclusion is buttressed by a number of documents in evidence, in addition to the language changes themselves.

The first is the February 14, 2011, memorandum to the Council by Marlene Michaelson, Senior Legislative Analyst, recommending an amendment to the Planning Department work program related to the Clarksburg Master Plan retail staging provisions (Exhibit 69). As stated by Ms. Michaelson,

... [while the intent of the Master Plan staging provisions] was to encourage a focus on Town Center, it appears to have had the inadvertent effect of potentially delaying the development of a grocery store in Clarksburg. Although a Town Center property owner had originally planned to develop a grocery store, they have no immediate plans to move ahead, while other property owners outside Town Center have expressed an interest in building a grocery store. The amendment would not remove the staging provision from the Master Plan, but would simply add an exception to allow a grocery store (and potentially ancillary uses) outside Town Center to proceed before 90,000 square feet of retail is developed in Town Center. There is currently no grocery store in Clarksburg, and a strong demand for one, and this amendment would allow one to be built outside Town Center.

In its February 15, 2011 session, the Council did, in fact, amend the Planning Department's work program to address this issue, as indicated in the Council's remand resolution to the Hearing Examiner. In that remand resolution, the Council took official notice of its February 15 action. Resolution 17-69 of March 1, 2011 (Exhibit 57).

The Planning Board's Technical Staff report of March 24, 2011, recommends approval of amendments to the Master Plan that will allow retail development in the Clarksburg Village

Center “to proceed without delay.” Exhibit 67. On May 10, 2011, the Planning Board transmitted the Draft Limited Amendment to the Clarksburg Master Plan to the Council. Attachment to Exhibit 71. The purpose of the amendment is clearly stated on page 8 of the Planning Board submission:

This Amendment allows retail uses in the Newcut Road/Clarksburg Village Center and the Cabin Branch Village Center to proceed before 90,000 square feet of retail are built in the Town Center. . . . [Emphasis added.]

In a memorandum dated May 26, 2011, County Executive Isiah Leggett recommended approval of the Draft Limited Amendment to the Clarksburg Master Plan (Exhibit 71 (Attachment)), and the Council approved the Planning Board’s Draft Limited Amendment at a public hearing on June 28, 2011, in Resolution 17-188 (Exhibit 59).

The evidence is thus overwhelming that, even if Newland had been correct about the original vision of the Clarksburg Master Plan, that vision was modified by the Limited Amendment to the Master Plan recommended by the Planning Board and approved by the Council.

Newland has presented no evidence to support its contention that the proposed DPA undermines “the Master Plan vision,” and the entire record supports the conclusion that the Master Plan was amended to allow the retail development proposed in DPA 11-1, without further delay.

Based on this record, the District Council finds that DPA 11-1 is consistent with the vision and specific provisions of the amended Clarksburg Master Plan & Hyattstown Special Study Area.

The Public Interest

Technical Staff agreed with Applicant’s argument that the retail is needed now in Clarksburg Village, but prior to the Master Plan amendments, felt that the restrictive Master Plan language had to be followed at the Preliminary Plan stage (Exhibit 19, p. 4):

Although staff fully recognizes the current need and demand for community and neighborhood serving retail in Clarksburg, the applicant’s proposed amendment to the timing condition is contrary to these Master Plan recommendations. Moreover, the Board, in its Preliminary Plan Hearing held in April, 2010, clearly shared staff’s concern about the timing of retail development in Clarksburg. As a result of their deliberation, a condition was added to the Preliminary Plan that . . . [required adherence to the Master Plan staging restriction].

* * *

In other words, if the DPA is approved by the Council, the applicant could still not go forward unless a Preliminary Plan amendment is approved. Since preliminary plans require master plan conformity, the Board would have to find either that the amendment is in conformity with the Master Plan or that the Master Plan would have to be amended before the applicant could proceed with the retail portion of his plan.

Technical Staff therefore suggested (Exhibit 19, p. 5):

If the County Council decides in favor of a Development Plan Amendment, the Council should require an amendment to the Clarksburg Master Plan.

The Planning Board also concluded that commercial development on the subject site is needed to serve the community without delay, but a two-to-one majority, felt constrained by the language of the Master Plan as it existed prior to its June 28, 2011 amendment. As stated by the Planning Board, in its letter of November 24, 2010 (Exhibit 21, p. 1):

- It would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center development to which the Master Plan gave top priority, but the requirement that a DPA must substantially comply with the applicable master plan is not satisfied. Accordingly, a minor master plan amendment should be undertaken to reconsider the retail phasing recommendations in the Clarksburg Master Plan.

The Planning Board suggested a remedy similar to that recommended by its Staff (Exhibit 21, p. 2):

- If the County Council agrees in principle that it would serve the public interest to permit development of retail uses in Clarksburg Village but that the present application is not in conformance with the Clarksburg Master Plan, the Council should direct the Planning Board to prepare a limited master plan amendment for the sole purpose of amending the staging plan in the Clarksburg Master Plan, to accommodate a different sequencing of commercial development.

The Planning Board's letter (Exhibit 21, p. 2) notes that:

Commissioner Dreyfuss opposed the motion to recommend denial, voicing concern that people deserve to have the opportunity to shop for basic needs in their own communities. In his view, precluding one commercial/retail center development to promote another is not good policy. He spoke in favor of the Clarksburg Village Center moving forward with retail implementation, with some specification needed on a reasonable amount of time to allow retail development to proceed.⁵

Of course, the concerns of Technical Staff and the Planning Board about compliance with the Master Plan have now been eliminated by the June 28, 2011 amendments to the Master Plan discussed above. As stated by Françoise Carrier, the Chair of the Planning Board, by letter dated August 18, 2011 (Exhibit 62), "... adoption of the Master Plan Amendment resolves the only objection that the Planning Board had to DPA 11-1." She observed that "it would serve the public interest to permit development of retail uses in Clarksburg Village without waiting for the Town Center Development to which the Master Plan gave top priority. . ."

The statutory requirement of §59-D-1.61(a), quoted above, clearly emphasizes "*substantial . . . compli[ance] with the use and density indicated by the master plan,*" not its

⁵ In this connection, Applicant's counsel suggested that delaying Applicant's ability to carry out its development for 16 years, in favor of another nearby developer, could be considered as a taking by the County. 11/29/10 Tr. 144-145. In view of the resolution of this case, the District Council need not reach this issue.

timing in conjunction with development elsewhere.

The purpose clause of the PD-4 Zone, §59-C-7.11, provides that the zoning category is intended to implement the general plan and area master plans “in a manner and to a degree more closely compatible with said county plans and policies,” and now that the staging requirements of the Master Plan have been modified, DPA 11-1 is in compliance not only with the overall goals of the Master Plan, but also with its amended staging requirements. In fact, the recent amendments to the Master Plan have effectively eviscerated Newland’s argument that DPA 11-1 would be non-compliant with the Master Plan and would undermine its purpose. Newland’s assertions that DPA 11-1 would harm retail development in the Town Center are unsupported by any evidence and ignore the plain meaning and intent of the recent Master Plan amendments.

In this case, it is clear that the Master Plan’s underlying goal is to provide timely retail development in Clarksburg so as to serve residential development. All of the evidence in this case establishes that this important goal is not being achieved, and approval of DPA 11-1 would help to rectify that situation. There are real people living the Newcut Road Neighborhood, and they have real needs, as evidenced by the testimony produced at the hearing in this case.

The language of the PD-4 Zone’s purpose clause (§59-C-7.11) supports the interpretation that the Zoning Ordinance encourages the provision of convenience retail in the PD-4 Zone:

. . . It is intended that development in this zone produce a balanced and coordinated mixture of residential and convenience commercial uses, as well as other commercial and industrial uses shown on the area master plan, and related public and private facilities. . . . [Emphasis added.]

The intent of the Master Plan was to encourage development in Clarksburg, not throttle it. The District Council finds that its approval of DPA 11-1 will serve the public interest by providing the much needed retail to serve the residential community sooner, rather than later.

Based on the foregoing analysis, and after a thorough review of the entire record, the District Council concludes that the proposed DPA would accomplish the goals of the Master Plan; that the terms of DPA 11-1 are consistent with the amended staging requirements of the Master Plan; and that further delaying retail development in Clarksburg Village would be against the public interest.

For these reasons and because granting the instant DPA application would aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the DPA will be granted in the manner set forth below.

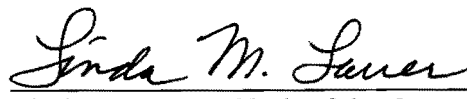
ACTION

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Development Plan Amendment DPA 11-1, seeking to amend the development plans approved by the Council on April 10, 2001, as part of LMAs G-735 and G-784, and previously modified in DPA 04-3 (approved by the Council on December 14, 2004) and DPA 05-1 (approved by the Council on June 24, 2008), for the property known as the Clarksburg Village

Center, consisting of 17.4 acres on Parcel P047, located on a block defined by Arora Hills Drive on the north, Newcut Road on the east, Snowden Farm Parkway on the south, and Little Seneca Parkway on the west, in Clarksburg, Maryland, is approved in the manner requested and subject to the specifications and requirements of the Development Plan Amendment, Exhibit 51(a), provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan Amendment approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance.

This is a correct copy of Council action.


Linda M. Lauer, Clerk of the Council